Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MONTANANS FOR MULTIPLE USE, A NOT-FOR-PROFIT ORGANIZATION, ET AL., PETITIONERS

v.

CATHY BARBOULETOS, FLATHEAD NATIONAL FOREST SUPERVISOR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners properly brought a failure to act/unreasonable delay claim pursuant to the federal Administrative Procedure Act.

2. Whether the Court of Appeal improperly applied the standard of review on motions for judgment on the pleadings in its findings that petitioners did not sufficiently allege both bad faith and inexpedition on the part of respondents in the forest plan revision process?

3. Whether the Court of Appeal erred in concluding that Congress intended in enacting Pub. L. 111-8 in 2009 intended to excuse delays in revising forest plans where it is alleged that respondents acted in bad faith or inexpeditiously, or whether it acts only as a rule of decision when bad faith or inexpedition are not alleged.

4. Whether the rule of decision set forth in Pub. L. 111-8 applies to a motion to dismiss when it was enacted after the motion to dismiss was briefed and argued.

5. Whether the Court of Appeal erred in holding that the Quiet Title Act applied to petitioners' declaratory judgment claim that the physical occupancy and invasion of roads/rights-of-way created pursuant to the Mining Act of 1866 ("R.S. 2477") by blocking and destroying them, thereby working an inverse condemnation of them under the Fifth Amendment to the United States Constitution, was prohibited by the "valid existing rights" language of the Federal Land Policy and Management Act.

6. Whether the Small Business Regulatory Enforcement Fairness Act ("SBREFA") permit courts to determine whether the conditions precedent to the effectiveness of a federal agency regulation have been met.

PARTIES TO THE PROCEEDING

Petitioners are Montanans for Multiple Use; Northwest Montana Gold Prospectors Association; Leland's Honda and Suzuki, Inc.; Leland J. Moore; Montanans for Property Rights; Capital Trail Riders Association; Flathead Snowmobile Association; North American Wolf Watch; Owens & Hurst Lumber Company; the Honorable Jerry O'Neill, Montana State Senator in his official and individual capacities; the Honorable George Everett, Member Montana House of Representatives in his official and individual capacity; Flathead County, Montana; Sanders County, Montana; and the Flathead Business and Industry Association.

Respondents are Cathy Barbouletos, Flathead National Forest Supervisor and her successors-in-office; Brad Powell, Regional Forester, Intermountain Region and his successors-in-office; Dale Bosworth, Chief, United States Forest Service, and his successors-in-office; the United States Forest Service; Anne M. Veneman, Secretary of Agriculture, and her successors-in-office; the United States Department of Agriculture; Does 1-50; and Defenders of Wildlife and the Swan View Coalition

Rule 29.6

Petitioners herein state that no organizational Petitioner herein is a corporation in which a parent corporation or any publicly held corporation that owns 10% of any stock. Further, the organizational entities herein qualify as "trade associations" in that they are continuing associations of numerous organizations or individuals operated for the purpose of promoting the

general commercial, professional, legislative, or other interests of the membership.

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I

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeal for the District of Columbia Circuit upholding, on the grounds stated in the opinion of the Appellate Court, the decision of the United States Court for the District of the District of Columbia dismissing in its entirety the Complaint of Petitioners herein.

OPINIONS BELOW

The opinion of the Appellate Court denying petitioners' appeal for which this petition is made is published at 568 F.3d 225, 386 U.S. App. D.C 193 (D.C. Cir. 2009) and is set forth in full at Appendix (App.) at 1a - 8a. The opinion of the District Court granting respondents' Motion for Judgment on the Pleadings is published at 542 F. Supp. 2d 9 (D.C. Dist. 2008) and set forth in full at App. 9a - 31a. The District Court's order granting the Motion is set forth at App. 33a. The order of the District Court denying the defendant-intervenors' Motion for Judgment on the Pleadings as moot is set forth in full at App. 32a. The order of the Appellate Court denying petitioners' petition for rehearing is set forth in full at App. 34a.

JURISDICTION

Jurisdiction in this case is proper under 28 U.S.C. § 1254 which provides that cases in the courts of appeals may be reviewed by the Supreme Court by a writ of certiorari granted upon the petition of any party to a civil or criminal case before or after the rendition of

judgment or decree. The decision in the Court of Appeal was entered on June 5, 2009. Petitioners herein petitioned the Court of Appeal for rehearing, which petition was denied on September 18, 2009. Petitioners filed a motion with this Court for an extension of time to file their Petition for Certiorari to February 15, 2010, which motion was granted.

RELEVANT PROVISIONS BELOW

The Constitutional provision applicable hereto is United States Constitution, Amendment V, which provides in pertinent part "nor shall private property be taken for public use, without just compensation."

Pursuant to this Court's Rule 14, the federal statutory provisions relevant hereto, 5 USC § 551; 5 U.S.C § 702; 5 U.S.C. § 706; P.L. 104-121, March 29, 1996, (As Amended by P.L. 110-28, May 25, 2007); 5 U.S.C. § Sec. 801; 5 U.S.C. § 808; 16 U.S.C. § 1604 (a) – (f); 28 U.S.C. § 2201, 2202; 28 U.S.C. § 2202; 28 U.S.C. § 2409a (a); 43 U.S.C. § 1701(h); 43 U.S.C. § 1761(c)(2)(A); 42 U.S.C. § 1769; and Pub. L. 110-161, § 410 are set forth at App. 36a - 52a.

STATEMENT

A. Factual Background

The Flathead National Forest is located in Northern Montana, south and west of Glacier National Park, and between the Lewis and Clark National Forest to the east and Kootenai and the Lolo National Forests to the south and west. The major industries in the area are natural resource extraction, including,

among other things, timbering; recreation; and tourism. Because the majority of the land in the area is federally owned, and is managed by the United States Forest Service, its condition and the manner in which it is managed may have significant effects both nationally and locally for good or ill. Indeed, improper management of National Forests by the federal agencies charged with such care and management may significantly, adversely affect the economy, social structure, and culture of the areas in which they are located.

The National Forest program was established by Congress in order to ensure that the needs of the nation for timber would continue to be met in perpetuity, as well as the nation's need for recreational and other uses of federal land. Federal statutes governing the use and management of National Forest lands require that local community needs be considered and protected in any decisions made by the Forest Service. Failure to meet these statutory mandate can also adversely affect the health and safety of persons living in the areas of these forests and that of their real and personal property.

For example, the NFMA requires that the Forest Service manage Forest lands to ensure multiple use and sustained yield of timber and to ensure that it does so in such a way as to maximize economic and social benefits in an environmentally responsible way by using a coordinated and comprehensive, scientifically valid planning process which includes input from all affected parties. The NFMA also requires Respondents to revise the Forest Plan at least every 15 years and mandates that it do so sooner if there are significant changes that occur. Similarly,

FLPMA, *supra*, 43 U.S.C. § 1701, *et seq.*; SBREFA, *supra*, 5 U.S.C. § 801 *et seq.*; and the APA, *supra*, 5 U.S.C. § 551, *et seq.*, exist to ensure that procedural rights are given to affected parties, that valid existing property rights within the boundaries of the National Forests and other federally-owned lands are respected and protected, and that local needs are considered when planning for, and managing, federal lands. *Id.*

Pursuant to the mandates of the NFMA, the Flathead National Forest issued its Record of Decision adopting a Forest Management Plan for the Flathead on or about January 22, 1986, approximately 3 months after the date set for the adoption of an initial plan.[1]

Immediately, respondents began to adopt a series of "amendments" to the Plan, purportedly pursuant to 16 U.S.C. § 1604 (f)(4), all of which purported to be non-significant. As of the date of the filing of the Complaint in this case, proposed amendments to the Plan, not including "regional amendments" (i.e., amendments involving all of the National Forest units in the area) numbered approximately 24 (a rate of approximately 1.5 proposed amendments per year). Respondents continue even now to process plan amendments.

Not one of the proposed amendments was accompanied by the comprehensive scientific review and public participation required 16 U.S.C. § 1604. No decision document or review document issued by

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[1]The NFMA required all units of the National Forest System to adopt an initial Forest Plan by September 30, 1985. See, 16 U.S.C. § 1604(c).

Respondents considered the cumulative impact of the amendments. No amendment has been submitted to the GAO or the Congress pursuant to SBREFA. Indeed, as the Complaint alleges, respondents concealed information regarding the significance of proposed amendments and misled the public into believing that no significant changes were being made.

Petitioners alleged that the cumulative impact of these amendments on the Flathead National Forest Plan, particularly Amendments 1-3, 5-7, 19, 21, and 24 and the two regional Amendments, among other actions, has resulted in a such a substantial change to the Plan as originally adopted in January, 1986 that they *de facto* revised the Plan without using the degree of review and public participation required by the NFMA for significant plan amendments, much less plan revisions.

Notwithstanding the fact that at the time the complaint was filed nearly eighteen years had passed since the existing Forest Plan was adopted and the plan had not only *not* been revised as required, respondents had not taken *any* concrete steps to revise the plan. Only after this case was filed did respondents' begin to take steps to revise the plan. See, e.g., 69 Fed. Reg. 2699 (January 20, 2004) (announcing a schedule for the processing of a plan). At the time of the writing of this Petition, approximately 25 years after the adoption of the Forest Plan in the Flathead National Forest, no plan revision has been adopted. At this time, respondents are literally no nearer to adopting a plan revision than they were in 2003.

Subsequent to the adoption of the plan and its multifarious amendments, respondents took numerous actions deleterious to the rights of petitioners and local communities. For example, they had: (1) closed off to public access vast portions of the forest (approximately 102,000 acres out of the 670,00) (much more is planned); (2) prevented timber harvest in areas clearly suitable for harvest; (3) prevented timber salvage in a timely fashion; and (4) otherwise substantially modified the uses allowed in the Forest as a whole and in specific areas of the Forest. Beginning in 1995, pursuant to Amendment 19, respondents embarked on a course of road, trail, and right-of-way closures, obliterations, and other actions making such roads, trails, and other rights-of-way unavailable or unusable. These closures knowingly and intentionally made progressively less of the land in the Forest available and "suitable" for timber harvest and put the affected areas at substantial risk of fire, insect infestation, and disease. By implementing site-specific obliteration of roads in areas designated by the current Forest Plan as suitable for long term sustained harvest with roads, respondents have made site specific changes to the designated long term forest land use without public disclosure of direct, indirect, or cumulative effects or using NFMA mandated processes for change and deprived petitioners and others of the use and the protection their existence gave to their properties.

B. Proceedings in the District Court.

The complaint in this case was filed in the United States Court for the District of the District of Columbia on June 10, 2003. Jurisdiction in the District Court is conferred by 28 U.S.C § 1331 in that the

respondents are agents and agencies of the United States taking, and failing to take, the actions alleged herein by and under the authority of the Executive Department of the United States and Acts of Congress, including, but not limited to, the Sustained-Yield, Multiple-Use Act (16 U.S.C. § 528, *et seq.*), FLPMA, *supra*; SBREFA, *supra;* the APA, *supra*; and other federal statutes.

The complaint raised four claims for relief; (1) that the respondents knowingly and intentionally and in bad faith failed to take actions mandated by the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, including, but not limited to, adopting a Forest Plan Revision as required by the NFMA; (2) that the respondents knowingly and intentionally and in bad faith failed to carry out a revision and unreasonably delayed the carrying out of its mandatory duty to revise the Flathead National Forest management plan within the time required by statute, instead using numerous amendments of the plan to avoid its obligation to revise the Plan in the time and manner required by law; (3) that the respondents, in the implementation of their plan, physically invaded and occupied rights-of-way for the purpose of "closing roads", including roads not owned by the United States, thereby taking the non-federal rights-of-way within the meaning of the Fifth Amendment to the United States Constitution; (4) that the taking of such rights-of-way is restricted by the "valid existing rights" language of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq.*; and (5) seeking a declaration that specified Forest Plan Amendments done in lieu of the required revision are not yet in legal effect because

they have not yet been submitted to Congress as provided for in 5 U.S.C. § 801.

On August 22, 2003, intervenors in this action filed their motion to intervene along with a motion for transfer of venue. The motion to intervene was granted on September 3, 2003, but the motion for transfer of venue was denied. Respondents and the defendant-intervenors filed motions for judgment on the pleadings on November 1, 2004. Respondents' motion was granted (App. 33a), but the intervenors' motion was denied as moot. App. 32a.

Respondents challenged the complaint on several grounds. They argued that: (1) petitioners had not identified any mandatory duty in the First Claim for Relief; (2) petitioners' Second Claim for Relief was prudentially moot; (3) petitioners' Third Claim for Relief was actually a Quiet Title Act claim which the counties didn't bring and which the non-county petitioners had no standing to bring; (4) petitioners lacked standing on certain forest plan amendment claims which petitioners had claimed had, as a whole constituted a *de facto* plan revision without compliance with statutorily mandated procedures on the grounds of a failure to exhaust administrative remedies, and (5) petitioners' Fourth Claim for Relief was barred by Section 805 of SBREFA.

The District Court heard oral argument on the motion for judgment on the pleadings on March 9, 2007. The court issued its opinion and order on March 31, 2008 granting the motion for judgment on the pleadings on virtually all grounds urged by respondents (App. 9a

- 31a). Petitioners filed their notice of appeal on May 7, 2008.

C. Proceedings in the Court of Appeal

The Court of Appeal for the District of Columbia Circuit, in a decision issued on June 5, 2009, affirmed the decision of the District court on all grounds except the alleged standing and prudential mootness defects. App.1a - 8a. It held that petitioners' claims, which the court divided into four categories, fail for the following reasons which were not set forth in great detail.

First, the court stated,

> plaintiffs allege that the Secretary failed to carry out management activities in accordance with the National Forest Management Act and the 1986 Forest Plan. In their submission to this Court, plaintiffs characterize this as a failure-to-act cause of action under the Administrative Procedure Act. 5 U.S.C. § 706(1). But plaintiffs' complaint does not identify a legally required, discrete act that the Forest Service has failed to perform -- a threshold requirement for a § 706 failure-to-act claim. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004).

(App. 4a). This, the Court acknowledged, was a "failure to act" claim brought pursuant to the APA. According to the Court, petitioners were relying on generalized statutory duties. This purported failure to identify a mandatory duty was sufficient to defeat the claim. As

will be seen, the Court below misapprehended the nature of the claim.

Second, the court stated,

> the plaintiffs contend that the Forest Service violated the National Forest Management Act by failing to timely revise the 1986 Flathead Forest Plan. As plaintiffs correctly point out, the Act requires that the Forest Service revise forest plans "at least every fifteen years," which here would mean by 2001. 16 U.S.C. § 1604(f)(5)(A). The problem for plaintiffs is that Congress has repeatedly extended that deadline. The latest extension -- passed by Congress and signed into law by President Obama on March 11, 2009 -- provides that "[p]rior to October 1, 2009, the Secretary of Agriculture shall not be considered to be in violation of . . . 16 U.S.C. 1604(f)(5)(A) . . . solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System.' Pub. L. No. 111-8, § 410, 123 Stat. 524, 746 (2009)."

App. 5a. The court acknowledged that these "savings" provisions did not apply if the Secretary "is not acting expeditiously and in good faith" (*id.*), but then declined even to determine whether this language was in the disjunctive (i.e., that the exception did not apply if the lack of action was *either* inexpeditious *or* in bad faith) or in the conjunctive. *Id.* 6a. It merely held that:

> the Forest Service has not ignored its obligation to revise the Flathead Plan. The complicated process to revise the Plan has been underway for

> several years as the Forest Service works to evaluate and incorporate new scientific, environmental, and economic information. Some delay has been occasioned, moreover, by other litigation over which the Forest Service has no control. In sum, plaintiffs' allegations provide no basis for finding that the Forest Service has not acted expeditiously and in good faith in attempting to revise the Plan.

Id.

Third, the Court held that as to the road closures, which petitioners had alleged had resulted in an inverse condemnation of the roads/rights-of-way in excess of the authority granted by the Federal Land Policy Management Act, petitioners were required to proceed in court pursuant to the federal Quiet Title Act rather than by the Administrative Procedure Act or the provisions of the Declaratory Judgment Act or 28 U.S.C. § 1346, which specifically apply to this case. Because it did not so proceed, the Court below dismissed this claim. The Court did not discuss why the exemptions to the QTA did not apply (which is particularly significant when the underlying claim is that a Fifth Amendment taking had occurred), why the fact that the United States had never claimed it had title did not take the claim outside the QTA's provisions, or why the non-county petitioners had to proceed under the QTA even though they had made no claim of title in themselves.

Fourth, the Court held that SBREFA § 805 (5 U.S.C. § 805) prohibited the Court from declaring whether the conditions precedent to the regulations at

issue becoming effective had been met. Petitioners had raised substantial argument with supporting citations as to why the Court had that power and was not excluded from it by § 805, but no explanation as to why this was not so was forthcoming in the Court's opinion.

Following the decision of the Court, petitioners timely filed a Petition for Panel Reconsideration which was denied on September 18, 2009. Petitioner filed a request for extension of time to file their Petition for Certiorari in this Court to February 15, 2010, which was granted.

REASONS FOR GRANTING CERTIORARI

I. The Questions Presented Are Of Great Public Significance and Review By This Court Is Essential To Reduce Conflicts Among the Courts and the Need For Frequent and Conflicting Litigation.

This Petition requests that this court examine the decisions below as they pertain to several broad legal issues with important implications.

First, the case involves the proper interpretation and application of various federal statutes to actions taken by respondents; specifically, actions which are mandated by law to be taken in a particular manner and in a particular time frame (that is, the wholesale revision of a Forest Management Plan, the process of doing which requires substantial public participation and environmental review) which will be further discussed below. The complaint below alleges that respondents either failed altogether to take such

actions or unreasonably delayed taking them. In addition, the complaint specifically alleges that respondents deliberately and intentionally undertook a series of actions for the specific purposes of avoiding the procedural and environmental review processes required by the National Forest Management Act, 16 U.S.C. § 1600, *et seq.*, and did so to accommodate certain constituencies while cutting off other parties, including petitioners, from participation in mandatory procedures. None of the legal issues raised in this case have been addressed authoritatively or at all by this Court, yet the resolution of these issues is important not only to petitioners, but to the United States as a whole. National Forests exist throughout the United States. The failure of respondents to understand and/or adhere to the statutory mandates given to them can have profound impacts on not only the persons and communities adjacent to and within these forests, but upon the purposes for which National Forests were established in the first instance.

Second, this case involves claims brought pursuant to the takings clause of the Fifth Amendment of the United States Constitution. The complaint alleges that the respondents, in their Forest Plan, contemplated and mandated the closure of roads and rights-of-way, including those not owned by respondents.[2] These roads and rights-of-way were and

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[2]For the purposes of this claim, petitioners can be divided into two groups. The first group comprises Sanders and Flathead Counties which, until the actions of respondents described above which "took" these roads in a Fifth Amendment sense, owned these rights-of-ways/roads. The second group, all of the remaining petitioners, comprise individuals and entities which have used and would, but for respondents' actions, continue to use these

are essential to travel within the area and for ensuring forest access to emergency response agencies, including, but not limited to fire departments, ambulances, and the like. Petitioners can concede merely for the purposes of argument that the mere nomination of these roads for closure did not implicate the takings clause, but respondents then went forward with their closure by physically invading and occupying these roads and rights-of-way, thereby – under cases such as *Loretto v. Teleprompter Manhattan CATV, Corp.*, 458 U.S. 419 (1982) and its progeny – engaging in a *per se* taking of the roads and rights-of-way in question. The Court below held that these claims must be adjudicated under the federal Quiet Title Act, 28 U.S.C. § 2409a (the "QTA") because a question of title is involved. Petitioners, on the other hand, acknowledged that there was a taking the moment the respondents physically invaded and occupied these rights-of-way. The only question for one group of petitioners, the counties, is what remedy they are entitled to, compensation or invalidation of the taking and return of title to them. The remaining group of petitioners are not claiming title of any kind, but merely assert that the respondents' actions were in excess of statutory authority. They are therefore entitled to bring suit as aggrieved parties as defined in the federal Administrative Procedure Act ("APA"),5 U.S.C. § 551, et *seq.*

The problem is that cases on the application of the QTA to cases in which a Fifth Amendment taking is alleged[3] are inconsistent. Both petitioners and

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roads/rights-of-way.

[3]Inverse condemnation cases (whether by regulation or physical

respondents below were able to cite cases on the question which contradict one another on the QTA's application. This Court has not spoken definitively on the application of the QTA to takings cases where the question in one of what remedy is applicable. This conflict and lack of clarity has caused, and will continue to cause, considerable unnecessary litigation until it is resolved.

Third, petitioners sought a declaration from the District Court that the conditions precedent to the effectiveness of regulations adopted by respondents, including the Forest Plan and Forest Plan amendments had not been met. Pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), 5 U.S.C. § 801 *et seq.*, before a rule can be effective, certain actions must occur.

> 5 U.S.C. § 801(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing--
>
> (i) a copy of the rule;
>
> (ii) a concise general statement relating to the rule, including whether it is a major rule; and

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invasion and occupancy) inevitably, of course, involve questions of title. The plaintiff must establish that he had property rights (i.e., title) and must prove that the government's actions "took" that property, thereby acquiring title. The courts below apparently seem to believe that the QTA must apply to such claims, at least when the plaintiff suggests that the taking is reversible because Congress had prohibited actions arising to the level of a taking.

(iii) the proposed effective date of the rule.

(B) On thedate of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

Opposed to § 801(a) is 5 U.S.C. § 805, which provides that "No determination, finding, action, or omission under this chapter shall be subject to judicial review." The courts below held that this section prohibits the court from declaring whether the conditions precedent to the effectiveness of a regulation have been met. Petitioners, on the other hand, respectfully submit that the court below failed to apply appropriate cannons of statutory construction which require that the statute be interpreted as a whole to ensure the attainment of the legislature's purpose to

avoid an absurd result and the frustration of Congress' intent.

II. The Court Below Erred in Finding that Petitioners Had Identified No Mandatory Duty Imposed on Respondents.

As discussed above, the Court below dismissed petitioners' "failure to act" claim holding that the complaint in the case "does not identify a legally required, discrete act that the Forest Service has failed to perform ." App. 4a. The Court below misapprehended the nature of petitioners' claims.

The failure to act claim was actually part of an overall claim that the respondents both failed to act and unreasonably delayed actions, both of which are legitimate Administrative Procedure Act claims. The APA permits "aggrieved" parties to bring an action to force an agency of the government to undertake, or to take in a timely fashion, actions which are statutorily imposed upon that agency. 5 U.S.C. § 702.[4] The Complaint alleged that both had occurred. Petitioners do not challenge the general position of the Court below

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[4]A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof *acted or failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. *Id.* (Emphasis added.)

that an APA challenge cannot be brought where no specific duty to act is identified.

Where the Court below erred was in finding that petitioners had *not* identified such a duty. Petitioners specifically alleged that the NFMA imposed a duty to act on the Secretary of Agriculture to adopt and revise forest plans adopted under the NFMA. 16 U.S.C. § 1604(a). The Secretary must revise the plan as conditions warrant and in no case more than 15 years after the plan was adopted or last revised. 16 U.S.C. § 1604(f)(5). The Court below may have been distracted by the Complaint's citations to other statutes governing Forest Service behavior with respect to forest management and Forest Management Plans. For example, the Complaint cites and described forest management statutes such as the Multiple-Use, Sustained-Yield Act ("MUSYA") (16 U.S.C. § 528, *et seq.*) and the failure of respondents to meet the goal imposed by this and other management directives, not as stand-alone responsibilities, but as being required elements in every Forest Management Plan. The NFMA itself requires that the goals of these statutes be incorporated into the plans and plan revisions required by 16 U.S.C. § 1604. A plan adopted by the Secretary lacking these elements would result in a failure to execute the mandatory duty imposed by § 1604 of the NFMA. The Court below appears to have focused on these elements rather than the duty imposed by § 1604 itself.

The Appeal Court's own opinion demonstrates that the NFMA does impose a mandatory duty on the Secretary when the Court addressed petitioners' unreasonable delay claim (what it calls the second

claim) under the APA. App. 5a-6a. In doing so, it held that the Secretary was excused by Congress for such delays in subsequent litigation. Petitioners do not agree with the conclusion, but note it here to demonstrate that the Court acknowledges that the NFMA is identified in the Complaint as imposing an enforceable duty on the Secretary.

Similarly, the Court below seems to have not acknowledged that the failure to act and unreasonable delay claims are part of a continuum. At the time the complaint was filed respondents had taken *no* action to revise the Forest Plan. As discussed above, respondents had not even begun the revision process until more than 6 months after petitioners filed their complaint. At the time the complaint was filed (June 10, 2003) there had been at most an utter failure by respondents to act and, at the least an unreasonable delay in beginning to undertake the mandated Forest Plan revision. There was no hint of a valid reason for such a delay, but there was plenty of reason for petitioners to believe and allege that the respondents were intentionally avoiding their obligation to revise the plan and/or delaying the initiation of the revision process, acting both inexpeditiously and in bad faith. *See* discussion *infra*.

III. The Court Erred in Finding That Respondents' Delay in Acting Was Excused by Pub. L. No. 111-8, § 410, 123 Stat. 524, 746 (2009) and That Petitioners Had Not Alleged Bad Faith or Inexpedition.

The Court below stated:

To be sure, that latest statutory extension -- like the six previous ones Congress enacted starting in 2001 -- also states that "if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System," the extension "shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis." *Id.* But by enacting repeated extensions, Congress has necessarily concluded that some delays in revising forest plans are justified. Because Congress just enacted the latest extension on March 11, 2009 (in effect, pardoning delays before that date) plaintiffs presumably have to show that the Forest Service has not acted expeditiously and in good faith since that date -- that is, during the last three months. See *Biodiversity Assocs. v. Forest Service*, 226 F. Supp. 2d 1270, 1300 (D. Wyo. 2002). Plaintiffs offer no suggestion to that effect. And even if the period since 2001 were the relevant time frame for assessing the Service's actions, plaintiffs have failed to allege facts that come close to sufficiently alleging either bad faith or lack of expedition. (Therefore, we need not decide whether the statutory extension provision requires a showing of (i) a lack of expedition and bad faith or (ii) a lack of expedition or bad faith.) As the District Court correctly explained, the Forest Service has not ignored its obligation to revise the Flathead Plan. The complicated process to revise the Plan has been underway for several years as the Forest Service works to evaluate and incorporate new scientific,

> environmental, and economic information. Some delay has been occasioned, moreover, by other litigation over which the Forest Service has no control. In sum, plaintiffs' allegations provide no basis for finding that the Forest Service has not acted expeditiously and in good faith.

App. 5a - 6a. Petitioners respectfully submit that this analysis is flawed.

Prior to the enactment of Pub. L. 111-8, Congress had enacted two virtually identical provisions in sequence as the prior provision expired: Pub. L. 107-63, title III, Sec. 327, 115 Stat. 470, and, after this had expired, Pub. L. 108-108.[5] Petitioners submit that these were not substantive rules of law, but rules of decision. As of the time of respondents' Motion to Dismiss, in 2005, the temporary and limited rules of decision set forth in these two laws had clearly expired and no replacement had been enacted. Petitioners submit that the court was required to use the rule of decision existing at the time this motion was submitted in making its decision. However, even if this is not the case, appellants submit that the appellees are not sheltered in the 2009 safe harbor for the following reasons.

5At the time of the briefing of the Motion for Judgment on the Pleadings, the prior safe harbor provision had expired and had not yet been replaced. After this motion had been briefed and after oral argument, Congress did enact a new public law two years later, Pub. L. 110-161, Title IV, § 410, Dec. 26, 2007, 121 Stat. 1844 ("2008 Consolidated Appropriations Act"), containing the same savings provision.

First, the Court assumed that Congress' re-enactment of the so-called savings provision in Pub. L. No. 111-8, § 410 excused *all* delays in Forest Plan revision occurring before its enactment, including those which were the result of bad faith or inexpedition. Hence, according to the Court below, petitioners would be required to show that respondents had acted in bad faith or inexpeditiously *since* Pub. L. 111-8's enactment, i.e., in the three months prior to the oral argument in this case. This is clearly not the case. In each predecessor to Pub. L. 111-8, the same exception to the "pardon" of delay, the language stating that "if the Secretary is not acting expeditiously and in good faith," the extension "shall be void with respect to such plan" appears. In other words, Congress has repeatedly exempted inexpeditious or bad faith delays from its benison. The Court's own language ("Congress has necessarily concluded that *some* delays in revising forest plans are justified" (emphasis added)), indicates that *some* delays are *not* justified. There is no indication from the language of Pub. L. 111-8 that Congress intended to excuse all delays rather than just those not caused by inexpedition or bad faith.

Second, while Pub. L. 111-8 provides that "[p]rior to October 1, 2008, the Secretary of Agriculture shall not be considered to be in violation of . . . 16 U.S.C. 1604(f)(5)(A) . . . *solely* because more than 15 years have passed without revision of the plan . . ." (emphasis added), it does not prohibit a court from considering the amount of time consumed by a delay as a factor in determining whether the delay is from inexpedition or bad faith. Again, these statutes act as rules of decision (in this case, whether a decision can be based on the single factor of a lapse past 15 years, or whether more

is required). In short, the proper interpretation of the language of Pub. L. 111-8 and its predecessors is that, absent a showing of inexpedition or bad faith, the failure to revise a plan within 15 years is not *per se* unreasonable, but after 15 years other factors, including the length of delay *after* 15 years can combine to enable a court to take action to move matters along.

Third, both the trial court and the Court of Appeal ignored the standard of review for Motions for Judgment on the Pleadings. This requires that the Court review a motion for judgment on the pleadings in the same way as that it does a motion to dismiss under Rule 12(b)(6). *Pasdon v. City of Peabody*, 417 F.3d 225, 226 (1st Cir. 2005). Courts of appeals review *de novo* a district court's decision to allow a motion to dismiss, taking as true the well-pleaded facts in the complaint and drawing all reasonable inferences in favor of the plaintiff. *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66, 69 (1st Cir. 2005). Because granting such a motion terminates the case on its merits, the complaint is construed broadly. *Ponder v. United States*, 117 F.3d 549, 552-53 (Fed. Cir. 1997). It must be apparent that there are no issues of material fact and only questions of law exist. *Corrigan v. Methodist Hospital*, 158 FRD 70 (E.D. Pa. 1994). The Court of Appeal did not do this. It simply held that,

> the Forest Service has not ignored its obligation to revise the Flathead Plan. The complicated process to revise the Plan has been underway for several years as the Forest Service works to evaluate and incorporate new scientific, environmental, and economic information. Some delay has been occasioned, moreover, by other

> litigation over which the Forest Service has no control. In sum, plaintiffs' allegations provide no basis for finding that the Forest Service has not acted expeditiously and in good faith in attempting to revise the Plan.

App. 6a.

Not surprisingly, given that the Motion was not an evidentiary one, no evidence supports the claim that the Forest Service had been hard at work for "several years" evaluating and incorporating *any* kind of information or that it had been prevented from working on a Forest Plan revision by forces outside its control. These were simply assertions made by respondents during the motion process. Neither should it have mattered, given the nature of the motion. It is beyond dispute that respondents did not even begin the revision process until more than six months *after* the complaint in this case was filed, more than 18 years after the existing plan was initially adopted. It is impossible for respondents to fairly claim to have been hard at work on the process for years especially since it is beyond dispute that they were actively involved in passing amendments, using time, energy, money, and other resources on endless amendments rather than undertaking the revision process.

Petitioners complaint is replete with allegations of ultimate fact going to the bad faith and inexpedition of respondents. In ¶¶ 39-42, 45, and 48 of the complaint, petitioners alleged that appellees knowingly and intentionally engaged in a pattern and practice of conduct designed to avoid the stringent requirements of the NFMA's plan revision provisions by *inter alia*,

enacting piecemeal amendments with the intent to avoid statutory obligations both under the NFMA and the National Environmental Policy Act ("NEPA") (see e.g. Complaint ¶¶ 39-42, 45, 48), that they acted not based on professional judgment and standards, but on such considerations as whether they might be sued, their own personal preferences as to the uses they preferred to be made of Forest lands, and on political considerations (Complaint ¶ 54), and that they intentionally dragged their feet on making the required Plan revision (Complaint ¶ 52), continuing instead to expend resources on amendment after amendment at the time they were supposed to be revising the Plan, demonstrating that they had the resources to undertake a plan revision but did not want to do so. Appellants respectfully submit that these allegations and others in the Complaint were more than sufficient to let the issue of inexpedition and/or bad faith to go to trial.

IV. Petitioners Road/Right-of-Way Closure Claim is Not Subject to the Quiet Title Act (28 U.S.C. § 2409a)

A. The QTA Does Not Apply to Any Petitioner's Claim.

The Court of Appeal stated:

> Plaintiffs argue that this statutory provision prohibits the Service from closing roads that do not belong to the United States. As relief for this claim, plaintiffs want ownership of the roads and trails; they do not seek compensation for any alleged taking of their property. The upshot is

> that plaintiffs are necessarily challenging the United States' title to the lands. But such a claim must proceed under the Quiet Title Act, 28 U.S.C. § 2409a. The Quiet Title Act provides "the exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983); see also *Shawnee Trail v. Dep't of Agric.*, 222 F.3d 383, 387-88 (7th Cir. 2000); *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1, 2-3 (D.D.C. 1995), aff'd sub nom. *Hat Ranch, Inc. v. United States*, 102 F.3d 1272, 322 U.S. App. D.C. 244 (D.C. Cir. 1996) (per curiam) (unpublished). Because plaintiffs' complaint does not assert a cause of action under the Quiet Title Act, their argument regarding the road and trail closures is unavailing.

App. 7a. This brief analysis misapprehends the nature of the claim, the facts alleged in the complaint, ignores the express language of 28. U.S.C. § 2409, and the nature of two different groups of petitioners. It makes its decision turn not on the gravamen of the claim (i.e. that an agency of government has engaged in an action causing an inverse condemnation of property which action is in excess of statutory authority of the agency) but on the remedy requested.

> 28 U.S.C. § 2409 provides:
>
> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest . . .

> This section does not . . . apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title . . .

By its express terms, it applies only in cases in which: (1) the United States claims an interest in real property; and (2) the action may not or could not have been brought pursuant to, among other sections of Title 28, 28 U.S.C. § 1346, the statutory basis for jurisdiction over this matter in the District Court which provides for concurrent jurisdiction between the United States District Courts and the United States Court of Federal Claims over, *inter alia*, "any other civil action or claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of any executive department."

Both kinds of claims are present in this case. Petitioners alleged in the complaint that respondents took physical actions amounting to inverse condemnation under the Fifth Amendment. Appellants also alleged that Congress limited the authority of respondents under FLPMA to those actions which fall short of a taking of such property. *See*, e.g., *Symposium on Valid Existing Rights*, 5 J. Min. L. & Pol'y 318 (1989-90); Jan G. Laitos and Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 Harv. L. Rev. 1 (1987). Therefore, both constitutional and statutory authority claims, exempted from the Quiet Title Act by its own terms, are pled in the instant case. But for the above described limitation on agency action by Congress by the "valid existing rights" language in the

FLPMA,[9] limiting the authority from the executive branch and its officials to take actions amounting a taking with such rights-of-way, this matter might well have been in the Court of Federal Claims. The remedy requested cannot overcome the essential nature of the claim as a taking claim.

Appellants submit that the court below erred by characterizing the claims as subject to the QTA merely because a question of who owned the property before the physical invasion and occupancy by the appellees occurred exists. This question always exists where a party claims either that an authorized governmental action amounted to a compensable taking or that an unauthorized action of government deprived a party of the rights-of-ownership which must be restored. He must prove he had a property interest to be taken.

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[9] *See*, e.g., 43 U.S.C. § 1701(h) (" All actions by the Secretary concerned under this Act shall be subject to valid existing rights"); 43 U.S.C. § 1761(c)(2)(A) (" Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate"); 42 U.S.C. § 1769 (" Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter").

Accepting the view of the Court below turns virtually every taking case into a QTA action as long as federal land is anywhere near.

Second, courts have rejected the notion that the Quiet Title Act applies where there is a constitutional claim, or a claim that a governmental action was taken outside of the scope of officials' authority or is a compensable taking of property under the Fifth Amendment. *Wright v. Gregg*, 685 F.2d 340, 341-42 (9th Cir. 1982); *McClellan v. Kimball*, 623 F.2d 83, 85 (9th Cir. 1980); *Oak Forest, Inc. v. U.S.*, 23 Cl. Ct. 90 (Fed.Cl. 1991). See also, *Golden v. U.S.*, 15 Cl.Ct. 513, 518 (Fed.Cl. 1988). These cases conflict with those cited by the Court below and demonstrate the need for this Court's intervention. What is sought here is a declaration that the respondents exceeded their authority by taking an action which amounted to a taking of property. Such a determination may involve a ownership question, but that is a side-effect and not the gravamen of the claim. The title question is a subsidiary one. Indeed, nothing here supports a claim that the respondents were asserting title by their actions, but merely a right to regulate or to control roads across National Forest lands *regardless* of who owns them; in other words, the government itself did not claim prior title or much care. Therefore, there were no competing title claims at the time of the respondents' road/right-of-way closure actions. The complaint in the case does not seek a declaration of title or a resolution of competing title claims, but only that the actions of the government were so intrusive that it took property which must now be returned. Clearly this is not the case contemplated by the QTA.

B. Even if the County Petitioners Were Required to Bring Their Claim Under the QTA, The Non-County Appellants are Not.

Nothing in the Quiet Title Act suggests that it applies except in situations in which there are competing claims of ownership. In this case, if such exist, they exist only between the United States and the County petitioners. Even if a title dispute existed between the counties and the United States subject to the QTA, the limitations of the QTA do not apply to the non-county petitioners who are not claiming ownership in themselves, but have raised a classic APA challenge to the road closures, that the respondents' actions are "not in accordance with law" (5 U.S.C. § 706(2)(a)) or are "in excess of statutory limitations" (5 U.S.C. § 706(2)(c)). There is no indication in the APA or the Quiet Title Act that Congress intended to leave persons who are adversely affected by unlawful governmental action, but cannot assert an ownership interest in some property, without a remedy. That remedy is, by its terms, provided in the cited sections of the APA. On their faces, both the APA and the Quiet Title Act are intended to waive sovereign immunity to give parties affected by government action recourse. To rule that a person who may be grievously injured by a road closure in violation of statute because he owns property served by the road or has other interests served by the road but does not own the road itself would pervert the intent of both the Quiet Title Act and the APA.

C. The Court Is Not Barred from Determining Whether the Conditions Precedent to Appellees Rules Becoming Effective Have Been Met.

The Small Business Regulatory Enforcement Fairness Act, 5 U.S.C § 801, *et seq.*, provides that "*before* a rule can take effect" federal agencies must submit it to Congress and the Comptroller General, setting a condition precedent to the effectiveness of federal regulations. 5 U.S.C. § 801(a)(1)(A) and (B). *Emphasis added.*

The court below did not find that Forest Plans and Plan Amendments are not rules within the meaning of SBREFA, nor do respondents contend otherwise. The court simply held that it could not entertain petitioners' SBREFA claim solely because of 5 U.S.C. § 805 which states that "no determination, finding, action, or omission under this chapter shall be subject to judicial review."

Both respondents and the District court took the position, affirmed by the Court below, that 5 U.S.C. § 805, read in isolation, is so clear and unambiguous that the court's hands are tied. The problem is that 5 U.S.C. § 801 is equally clear and unambiguous. It specifically provides that a regulation is *not* effective in law until it has been submitted to specified parties and a certain time has passed. In short, the two provisions are in direct opposition to each other. However, long recognized cannons of statutory construction come to our aid. These cannons hold that statutes must be interpreted as a whole and in such a manner as to not make the statute meaningless or to cause an absurd

result. See, e.g., *Raven Coal Corp. v. Absher*, 153 Va. 332, 149 S.E. 541 (1929) ("every part of a statute presumed to have some effect, and [should] not be treated as meaningless unless absolutely necessary"). Legislatures cannot be held to intend an absurd or manifestly unjust result. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989) Under these cannons, it is presumed that a statute will be interpreted so as to be internally consistent. See, e.g., *Williams v. Commonwealth*, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949) ("We must assume that the legislature did not intend to do a vain and useless thing"); *Lampkins v. Commonwealth*, 4 Va. App. 709, 607 S.E.2d 722 (2005) ("It is a well established rule of construction that a statute ought to be interpreted in such a manner that it may have effect, and not found to be vain and elusive.").

In this case, the express language of § 805 must be reconciled with the equally express language of 5 U.S.C. § 801(a)(1)(A) in light of the whole statute and its purpose. Fortunately, SBREFA itself and the public law which enacted it come to our rescue, enabling us to discern its purposes and to achieve a common sense interpretation of these sections.

Congress set forth its findings and the purposes of SBREFA in Pub. L. 104-121, March 29, 1996, (As Amended by P.L. 110-28, May 25, 2007).

SEC. 202. FINDINGS

Congress finds that--

(1) a vibrant and growing small business sector is critical to creating jobs in a dynamic economy;

(2) small businesses bear a disproportionate share of regulatory costs and burdens;

(3) fundamental changes that are needed in the regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business can be made without compromising the statutory missions of the agencies;

(4) three of the top recommendations of the 1995 White House Conference on Small Business involve reforms to the way government regulations are developed and enforced, and reductions in government paperwork requirements;

(5) the requirements of chapter 6 of title 5, United States Code, have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute; and

(6) small entities should be given the opportunity to seek judicial review of agency actions required by chapter 6 of title 5, United States Code.

SEC. 203. PURPOSES.

The purposes of this title are--

(1) to implement certain recommendations of the 1995 White House Conference on Small Business

regarding the development and enforcement of Federal regulations;

(2) to provide for judicial review of chapter 6 of title 5, United States Code;

(3) to encourage the effective participation of small businesses in the Federal regulatory process;

(4) to simplify the language of Federal regulations affecting small businesses;
(5) to develop more accessible sources of information on regulatory and reporting requirements for small businesses;

(6) to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution- oriented; and

(7) to make Federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id. SBREFA then sets forth in the remainder of § 801 and in § 802 an elaborate process governing the Congressional review process, granting exceptions to the limitations of § 801 of SBREFA, and other actions

required of agencies and other participants in the regulatory review process.

These provisions make it clear that Congress did not intend SBREFA to be a toothless enactment, but a vital piece of legislation, capable of making a difference in agency cultures and behaviors. How, then do we reconcile § 801(a)(1)(A) with § 805?

Petitioners submit that the actions and processes intended to be protected from litigation are those set forth in the remainder of § 801 (i.e. after § 801(a)(1)(A) and (B)) and § 802. These sections, as noted, set forth in great detail the procedures to be used by Congress and the Comptroller General's office to process and deal with the regulations submitted to them pursuant to § 801(a)(1)(A) and (B). It is clear that Congress intended that its *own* processes be shielded from scrutiny and the time consuming burden that could be imposed on it should its consideration of submitted regulations be subject to judicial review. This construction is required after scrutiny of the entirety of SBREFA pursuant to the appropriate cannons in order to avoid the frustration of Congress' intent as spelled out in § 203 Pub. L. 104-121. Section 805's prohibition cannot be reasonably read to include the provisions of § 801(a)(1)(A) and (B). Such an interpretation would undermine the whole scheme and purpose of SBREFA and deprive Congress of the rights it retained for itself to oversee agency rule-making. A mere determination as to whether the initial submittal required by § 801(a) was done does not impose a significant burden on any party and would ensure that Congress' purpose was fulfilled.

Petitioners have requested nothing more than a determination as to whether the conditions precedent to the effectiveness of Forest Service rules have been met. They are not requesting that a court compel any party to submit the regulations to the Comptroller General or to Congress, or to compel Congress to undertake any action of any kind if and when the regulations are submitted. Petitioners are asking only for a declaration as to whether the rules promulgated as Amendments are currently effective.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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(any footnotes trail end of each document)

No. 08-5131

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MONTANANS FOR MULTIPLE USE, A NOT-FOR-PROFIT ORGANIZATION, ET AL., APPELLANTS

v.

CATHY BARBOULETOS, FLATHEAD NATIONAL FOREST SUPERVISOR, ET AL., APPELLEES

January 23, 2009, Argued

June 5, 2009, Decided

COUNSEL: Mark L. Pollot argued the cause and filed the brief for appellant. Robin W. Grover entered an appearance.

Michael T. Gray, Attorney, U.S. Department of Justice, argued the cause for federal appellee. Mary G. Sprague, Attorney, U.S. Department of Justice, and R. Craig Lawrence, Assistant U.S. Attorney, entered appearances.

Timothy M. Bechtold was on the brief for intervenors-appellees. Erin D. Lieberman entered an appearance.

Before: GINSBURG and KAVANAUGH, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge KAVANAUGH.

OPINION

KAVANAUGH, *Circuit Judge*: Several Montana organizations and citizens are concerned about the U.S. Forest Service's management of the federally owned Flathead National Forest in northwest Montana. They want more of the forest to be made available for timbering and recreational activities. They filed a lawsuit against the Forest Service. A variety of environmental groups intervened against plaintiffs on the side of the Forest Service. Agreeing with the Forest Service and the environmental groups, the District Court dismissed plaintiffs' complaint. We affirm because plaintiffs cannot establish that the Forest Service has violated any federal law or otherwise taken action that is arbitrary and capricious under the Administrative Procedure Act. On the contrary, it is clear that plaintiffs' grievance lies with legally permissible policy decisions made by Congress and the Forest Service. Plaintiffs' plea for a new approach to management of the Flathead Forest is therefore best directed to the Legislative and Executive Branches.

I

The Flathead National Forest occupies 2.3 million acres of land in northwest Montana. The United States Forest Service, an agency of the Department of Agriculture, manages Flathead.

Two venerable statutes set forth the Forest Service's management goals: the Organic Administration Act of 1897, 16 U.S.C. § 475, and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528 et seq. The Organic Administration Act instructs the Forest Service to administer national forests so as to secure favorable

conditions of water flows and to furnish the country with a continuous supply of timber. 16 U.S.C. § 475. The Multiple-Use Sustained-Yield Act adds "outdoor recreation, range, timber, watershed, and wildlife and fish purposes" to the list of management objectives. *Id.* § 528. In addition, that Act requires the Forest Service to develop and administer the national forests' renewable surface resources "for multiple use and sustained yield of the several products and services obtained therefrom." *Id.* § 529.

The National Forest Management Act of 1976, 16 U.S.C. §§ 1600 et seq., establishes a two-stage process by which the U.S. Forest Service must pursue those statutory goals. At the initial stage, the Forest Service develops a Land and Resource Management Plan, also called a forest plan. *Id.* § 1604(a). The Forest Service may amend those plans "in any manner whatsoever after final adoption," provided that changes deemed "significant" meet certain substantive and procedural requirements. *Id.* § 1604(f)(4). The Forest Service must formally revise the plans at least once every 15 years -- although since 2001, Congress has repeatedly extended the 15-year deadlines. *Id.* § 1604(f)(5); *e.g.*, Pub. L. No. 111-8, § 410, 123 Stat. 524 (2009). At the second stage, the Forest Service analyzes and authorizes site-specific projects consistent with the governing plan. *Id.* § 1604(i); *see also Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 729, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998).

The Forest Service issued a forest plan for Flathead in 1986. For the past several years, the Service has been in the process of revising the Plan.

As relevant here, plaintiffs raised four claims in the District Court related to the Forest Service's management of Flathead. First, plaintiffs complained that the Forest Service generally managed the Forest in violation of the National Forest Management Act and the 1986 Flathead Plan. Second, plaintiffs alleged that the Forest Service has delayed too long in issuing a revised forest plan. Third, plaintiffs accused the Forest Service of improperly closing various roads and trails in the forest. Fourth, plaintiffs contended that the Forest Service has repeatedly amended the 1986 Plan without complying with certain congressional reporting duties imposed by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. §§ 801 et seq.

In a thorough opinion, the District Court dismissed plaintiffs' complaint. Our review is de novo.

II

In this Court, plaintiffs again advance four arguments.

First, plaintiffs allege that the Secretary failed to carry out management activities in accordance with the National Forest Management Act and the 1986 Forest Plan. In their submission to this Court, plaintiffs characterize this as a failure-to-act cause of action under the Administrative Procedure Act. 5 U.S.C. § 706(1). But plaintiffs' complaint does not identify a legally required, discrete act that the Forest Service has failed to perform -- a threshold requirement for a § 706 failure-to-act claim. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). Plaintiffs contend only that the Forest Service neglected its general statutory and

regulatory obligations to manage the forest so as to provide for multiple uses and a sustained yield of resources. *See* 16 U.S.C. §§ 1604(e)(1), 1606 note. Such conclusory statements amount to nothing more than allegations of general "deficiencies in compliance" that "lack the specificity requisite for agency action." *S. Utah Wilderness Alliance*, 542 U.S. at 66. Plaintiffs' allegations therefore do not support judicial action under § 706(1).

Second, plaintiffs contend that the Forest Service violated the National Forest Management Act by failing to timely revise the 1986 Flathead Forest Plan. As plaintiffs correctly point out, the Act requires that the Forest Service revise forest plans "at least every fifteen years," which here would mean by 2001. 16 U.S.C. § 1604(f)(5)(A). The problem for plaintiffs is that Congress has repeatedly extended that deadline. The latest extension -- passed by Congress and signed into law by President Obama on March 11, 2009 -- provides that "[p]rior to October 1, 2009, the Secretary of Agriculture shall not be considered to be in violation of . . . 16 U.S.C. 1604(f)(5)(A) . . . solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System." Pub. L. No. 111-8, § 410, 123 Stat. 524, 746 (2009).

To be sure, that latest statutory extension -- like the six previous ones Congress enacted starting in 2001 -- also states that "if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System," the extension "shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis." *Id.* But by enacting

repeated extensions, Congress has necessarily concluded that some delays in revising forest plans are justified. Because Congress just enacted the latest extension on March 11, 2009 (in effect, pardoning delays before that date) plaintiffs presumably have to show that the Forest Service has not acted expeditiously and in good faith since that date -- that is, during the last three months. *See* Biodiversity Assocs. v. Forest Service, 226 F. Supp. 2d 1270, 1300 (D. Wyo. 2002). Plaintiffs offer no suggestion to that effect. And even if the period since 2001 were the relevant timeframe for assessing the Service's actions, plaintiffs have failed to allege facts that come close to sufficiently alleging either bad faith or lack of expedition. (Therefore, we need not decide whether the statutory extension provision requires a showing of (i) a lack of expedition and bad faith or (ii) a lack of expedition or bad faith.) As the District Court correctly explained, the Forest Service has not ignored its obligation to revise the Flathead Plan. The complicated process to revise the Plan has been underway for several years as the Forest Service works to evaluate and incorporate new scientific, environmental, and economic information. Some delay has been occasioned, moreover, by other litigation over which the Forest Service has no control. In sum, plaintiffs' allegations provide no basis for finding that the Forest Service has not acted expeditiously and in good faith in attempting to revise the Plan.

Plaintiffs may be frustrated with the seven congressional extensions of the 2001 deadline for a new Flathead Forest Plan. But their frustration is the result of explicit action by multiple Congresses and two

Presidents -- and cannot be redressed by the Judiciary in this Administrative Procedure Act lawsuit.

Third, plaintiffs argue that the Forest Service illegally closed certain roads and trails in the Flathead Forest. According to plaintiffs, actions by the Service are subject to "valid existing rights." Federal Land Management Policy Act of 1976, Pub. L. No. 94-579, § 701(h), 90 Stat. 2743 (codified in scattered sections of 43 & 16 U.S.C.). Plaintiffs argue that this statutory provision prohibits the Service from closing roads that do not belong to the United States. As relief for this claim, plaintiffs want ownership of the roads and trails; they do not seek compensation for any alleged taking of their property. The upshot is that plaintiffs are necessarily challenging the United States' title to the lands. But such a claim must proceed under the Quiet Title Act, 28 U.S.C. § 2409a. The Quiet Title Act provides "the exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983); *see also Shawnee Trail v. Dep't of Agric.*, 222 F.3d 383, 387-88 (7th Cir. 2000); *Hat Ranch, Inc. v. Babbitt*, 932 F. Supp. 1, 2-3 (D.D.C. 1995), *aff'd sub nom. Hat Ranch, Inc. v. United States*, 102 F.3d 1272, 322 U.S. App. D.C. 244 (D.C. Cir. 1996) (per curiam) (unpublished). Because plaintiffs' complaint does not assert a cause of action under the Quiet Title Act, their argument regarding the road and trail closures is unavailing. *

Fourth, plaintiffs ask the Court to invalidate an unspecified number of previous Forest Service amendments to the Flathead Plan because the Service allegedly failed to satisfy the reporting requirement

contained in the Small Business Regulatory Enforcement Fairness Act of 1996. That Act provides: "Before a rule can take effect, the Federal agency promulgating such rule shall submit," among other things, a copy of the rule "to each House of the Congress and to the Comptroller General." 5 U.S.C. § 801(a)(1)(A). The Act, however, also states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." *Id.* § 805. That latter provision denies courts the power to void rules on the basis of agency noncompliance with the Act. The language of § 805 is unequivocal and precludes review of this claim -- even assuming that the plan amendments qualify as rules subject to the Act in the first place.

* * *

We affirm the judgment of the District Court dismissing plaintiffs' complaint.

So ordered.

Footnote

*To the extent plaintiffs suggested at oral argument that the Forest Service acted in an arbitrary and capricious manner in closing certain roads, plaintiffs did not develop that argument in their brief, and the complaint does not include such a cause of action. We therefore do not consider it.

Civil No. 03-1244 (TFH)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTANANS FOR MULTIPLE USE, et al.,
Plaintiff,

v.

BARBOULETOS, et al., Defendants, and SWAN VIEW COALITION, et al., Defendant-Intervenors.

March 31, 2008, Decided

Thomas F. Hogan, Chief Judge.

MEMORANDUM OPINION

Pending before the Court is defendants' Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c). Upon careful review of the motion, plaintiffs' opposition, and the replies thereto, the Court will grant defendants' motion.

I. PROCEDURAL BACKGROUND

Plaintiffs, Montanans for Multiple Use, et al. ("plaintiffs") are fourteen individuals and entities -- both private and governmental. [1] Named defendants include Cathy Barbouletos, Forest Supervisor for the Flathead National Forest; Brad Powell, Regional Forester for the Northern Region of the United States Forest Service ("USFS"); Michael Dale Bosworth, Chief of the USFS; the USFS; Ann M. Veneman, United States Secretary of Agriculture; the Department of

Agriculture; and Does 1-50, alleged to be employees or agents of the United States or the USFS ("defendants").

Plaintiffs filed a Complaint on June 10, 2003, alleging defendants: (1) failed to take actions mandated by the National Forest Management Act ("NFMA") and failed to fulfill the procedural requirements demanded by the NFMA; (2) failed to take actions and unreasonably delayed actions in violation of the Administrative Procedures Act ("APA"); (3) improperly closed certain roads in violation of the Federal Land Policy Management Act ("FLPMA"); and, (4) failed to submit the proposed management plan to each House of Congress in violation of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). On August 8, 2003, the Swan View Coalition, the Wildlife Center for Preventing Roads, the Montana Chapter of the Sierra Club, and Defenders of Wildlife ("defendant-intervenors") intervened pursuant to Fed. R. Civ. P. 24(a)(2). Defendants timely filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings on November 1, 2004, and seek dismissal of the Complaint in its entirety based on a failure to state a claim and lack of subject matter jurisdiction [Docket No. 31].

II. STATUTORY BACKGROUND

1. National Forest Management Act 16 U.S.C. § 1600, et seq.

Enacted in 1976, the NFMA compelled the Forest Service to develop a Forest Management Plan by September 30, 1985. 16 U.S.C. § 1604(c). Accordingly, the Forest Service adopted and issued its Record and Decision for a Forest Management Plan for Flathead

National Forest on January 22, 1986. Compl. ¶ 41. Forest Plans shall be revised "from time to time when the Secretary finds conditions in a unit have significantly changed, but no later than every fifteen years, and in accordance with [public involvement comparable to the development of the initial Management Plan]." 16 U.S.C. § 1604(f)(5)(A)-(B). The NFMA permits the Forest Service to amend the Forest Plan "in any manner whatsoever after final adoption [of the Management Plan]," but "if such amendment would result in a significant change in such plan, [the amendment must be adopted] in accordance with the provisions [governing revision of the Management Plan]." 16 U.S.C. § 1604(f)(4).

2. The Multiple-Use Sustained-Yield Act ("MUSYA") 16 U.S.C. §§ 528-531.

The Organic Administration Act of 1897, 16 U.S.C. § 551, conferred on the Forest Service the authority to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests" and to "make such rules and regulations and establish such service as will insure the objects of [the national forests], namely, to regulate their occupancy and use and to preserve forests thereon from destruction." *Id.* The MUSYA clarifies the regulatory authority and makes clear that the Forest Service is to manage national forests for "multiple uses" and "sustained yield," in the combination of uses that "best meet[s] the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions." 16 U.S.C. § 531(a).

3. The Small Business Regulatory Enforcement Fairness Act 5 U.S.C. 801.

The SBREFA, enacted on March 29, 1996, requires federal agencies to submit a report to both Houses of Congress and to the Government Accounting Office ("GAO") before a rule becomes effective. 5 U.S.C. § 801(a)(1)(A). A major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register, whichever is later. 5 U.S.C. § 801(a)(3)(A). Section 805 provides that "[n]o determination, finding, action or omission under this chapter shall be subject to judicial review."

4. R.S. 2477 (43 U.S.C. § 932)

The Mining Law of 1866 provided: "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932. The Federal Land Policy Management Act ("FLPMA") repealed R.S. 2477 on October 21, 1976, but expressly preserved any valid, then existing rights of way. FLPMA § 701(a), 43 U.S.C. § 1701.

5. Administrative Procedures Act ("APA") 5 U.S.C. §§ 551-559, 701-706.

Agency actions may be judicially reviewed under the APA and set aside if they are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Judicial review of agency action may be reviewed only where: (a) the agency has taken final action; or (b) in limited circumstances, where the agency failed to act and such action was both statutorily mandated and non-discretionary. *See Norton*

v. Southern Utah Wilderness Alliance, 542 U.S. 55, 61-64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004).

III. FACTUAL BACKGROUND

The Flathead National Forest occupies roughly 2.3 million acres in northwest Montana. The Forest Service adopted a Forest Plan for the management of the Flathead in 1986 and has since amended it approximately 23 times. [2] In addition, despite the statutory command to revise the Forest Plan at least every fifteen years, the defendants have not yet completed a revision. [3] Defendants' alleged failure to comport with certain statutory proscriptions related to the amendment and revision process forms the basis of Claims One and Two of plaintiffs' Complaint. Claim Three is based on certain road closures allegedly undertaken without proper authority. Finally, plaintiffs allege defendants failed to submit management plans and related matters to Congress. Such failures form the basis of Claim Four.

IV. STANDARD OF REVIEW

A 12(c) motion is appropriately granted when at the close of the proceedings "no material issue of fact remains to be solved, and [the movant] is clearly entitled to judgment as a matter of law." *In re United Mine Workers of America Employee Benefit Plans Litigation*, 854 F.Supp. 914, 915 (D.D.C. 1994) (quoting *Haynesworth v. Miller*, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1249 (D.D.C. 1987)). When considering a 12(c) motion to dismiss for lack of subject matter jurisdiction, the Court must accept the facts as alleged by the non-movant and all reasonable inferences drawn therefrom as true. *Peters v. National R.R. Passenger Corp.*, 296

U.S. App. D.C. 202, 966 F.2d 1483, 1485 (D.C. Cir. 1992) (citing *Jablonski v. Pan American World Airways, Inc.*, 863 F.2d 289, 290-91 (3d Cir. 1988)). Where the movant bases the motion on a failure to state a claim upon which relief can be granted, the Court may dismiss based on dispositive issues of law. *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

V. DISCUSSION

A. Claim One: Violation of the National Forest Management Act ("NFMA")

Plaintiffs allege defendants violated NFMA by: (1) evading the Forest Plan amendment and revision processes by making "substantial changes" to the Flatheaded National Forest Plan without proper procedure; (2) improperly adopting a *de facto* revision of the Forest Plan through a piecemeal amendment process; (3) failing to undertake the fifteen year revision of the Forest Plan as required by statute; and, (4) improperly closing certain roads when such roads "are required to ensure that adequate protection and care of the Forest can proceed." Compl. ¶ 50.

After the Forest Service adopts a Forest Plan, it may alter the Plan by amendment, significant amendment, or complete revision. The procedural requisites demanded by the NFMA turn on which type of alteration vehicle the Forest Service utilizes. If the alteration is merely an amendment, the Forest Service may adopt the amendment "in any manner whatsoever after final adoption after public notice." 16 U.S.C. § 1604(f)(4). Whereas, if the Forest Service undertakes either a complete plan revision, or an amendment that

results in a "significant change," it must undergo a more elaborate process. *Id.*

For the reasons hereinafter set forth, the Court will dismiss plaintiffs' allegations regarding a *de facto* revision, improper "substantial amendments," and improper road closures for failure to exhaust administrative remedies. Additionally, the Court will dismiss plaintiffs' allegations regarding the Forest Service's failure to undertake the fifteen year revision for failure to state a claim.

i. Failure to Exhaust Administrative Remedies

"Where Congress specifically mandates, exhaustion is required." *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992). Accordingly, "statutory exhaustion requirements are mandatory, and the courts are not free to dispense with them." *Bastek v. FCIC*, 145 F.3d 90, 94 (2d Cir. 1998). Applicable here, the U.S.D.A. Reorganization Act provides: "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before a person may bring an action in a court of competent jurisdiction against (1) the Secretary; (2) the Department; or (3) an agency, office, officer, or employee of the Department." 7 U.S.C. § 6912(e). The Second Circuit considered § 6912(e) and concluded, "[i]t is hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before beginning a lawsuit." *Bastek*, 145 F.3d at 94-95 (quoting *Gleichman v. U.S. Dep't of Agric.*, 896 F.Supp. 42, 44 (D. Me. 1995)). This Court agrees.

The applicable procedure for pursuing administrative remedies in effect when plaintiffs commenced this litigation, 36 C.F.R § 217.8 (2000), provided that a challenging party must:

> (1) File a written notice of appeal, in duplicate, with the next higher line officer in accordance with the provisions of Sec. 217.9 of this part. (2) File the notice of appeal within 45 days of the date specified in the published legal notice for non-significant amendments to land and resource management plans documented in a Decision Notice or Record of Decision. (3) File the notice of appeal within 90 days of the date specified in the published legal notice for land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions documented in a Record of Decision.

36 C.F.R. § 217.8 (2000). Plaintiffs recognize the statutory command to exhaust administrative remedies, but submit that there is "no procedure established by the Secretary for appealing multiple decisions taken over time which *taken together* are alleged to violate the NFMA," and the futility doctrine therefore rescues their claim from dismissal. Opp'n. 29-30. Defendants counter that plaintiffs have not met the burden the futility doctrine requires and, accordingly, their attempt to sidestep the consequences of their failure to exhaust fails. Defendants are correct.

Stated simply, plaintiffs allege that the series of amendments ebbed ever closer towards a *de facto* revision with each successive amendment. With the

issuance of Amendment 21 on January 14, 1999, the Off Highway Vehicle ("OHV") Amendment on January 21, 2001, [4] or some point in between, all of the amendments taken together morphed from a mere series of amendments into a *de facto* revision and the NFMA violation sprang to life. However, plaintiffs assert that the existence of a *de facto* revision "may not be readily apparent until actions are taken under [that particular amendment] or even more amendments are made." Opp'n. 31. Because, plaintiffs argue, the 45 and 90 day windows for regulatory challenge do not provide sufficient time for one to know whether a particular amendment has tipped the scale towards *de facto* revision, Section 217.8 does not contemplate an attack that alleges the cumulative effect of a series of amendments amounts to a *de facto* revision. Therefore, plaintiffs continue, it would have been futile for plaintiffs to comply with the U.S.D.A. Reorganization Act and exhaust their administrative remedies before seeking relief in federal court. [5]

Plaintiffs argument is unavailing and fails to meet the futility doctrine's strict burden. For the doctrine to apply, "[i]t must appear that pursuing available administrative remedies would have been 'clearly useless,' [and] that the ultimate denial of relief was a 'certainty.'" *Marine Mammal Conservancy v. Dep't of Agric.*, 328 U.S. App. D.C. 253, 134 F.3d 409, 413 (D.C. Cir. 1998) (quoting *UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trustees*, 312 U.S. App. D.C. 399, 56 F.3d 1469, 1476 (D.C. Cir. 1995)).

It cannot be said that plaintiffs' pursuit of administrative remedies would have been "clearly useless," or that plaintiffs would have been denied relief

with "certainty." By the regulation's terms, plaintiffs had either 45 or 90 days to file a notice of appeal from the date specified in the public legal notice, depending on whether they chose to challenge the amendments as advertised -- i.e., non-significant -- or as they alleged them to be -- i.e., a *de facto* revision masquerading as a mere series of non-significant amendments. They did neither. Instead, they chose to wait until June 10, 2003, to file for relief in federal court. Then, faced with the statute of limitations and exhaustion of remedies defenses, plaintiffs argued for the first time that one "may not know" a violation has occurred until actions are taken under that particular amendment or even more amendments are made. Opp'n. 31. There are several problems with this argument that plaintiffs cannot overcome.

First, accepting as true that one "may not know" a particular amendment has tipped the scale until actions are taken under it, plaintiffs do not allege in either their Complaint or Opposition that they, in fact, did not know a violation had occurred until after the 45 and 90 day windows expired. While such a doubtful scenario [6] may ensnare some hypothetical party in some hypothetical, attenuated set of circumstances, plaintiffs have not alleged that they are, in fact, a party so situated. To show that it would have been clearly useless or the outcome certainly determined and therefore excuse their failure to exhaust administrative remedies, plaintiffs must do more than allege that it would be futile for a hypothetical party in some hypothetical set of circumstances to seek administrative remedies, they must show that it was futile to *this* party to seek administrative remedies. They fail to do so.

Second, the regulation simply does not preclude an attack on a series of amendments as plaintiffs maintain. Plaintiffs state:

> [Section 217.8 does] not allow a reviewing officer to review past amendments in the light of the most recent actions or for an affected party to even request review of past actions in the light of current actions. Therefore, no appeal process exists which is designed to give a party an opportunity to appeal a series of decisions in the light of later actions.

Opp'n. 31. Contrary to plaintiffs' assertion, nothing in the regulation itself precludes plaintiffs from challenging that offending amendment in light of the previous amendments as they attempt to do here. The regulation provides an avenue to appeal the amendments and indicates nothing as to what the grounds for the appeal may or may not be. As defendants point out, "[t]he appeal rules permit challenges to non-significant forest plan amendments, and do not impose limitations on the subject matter of those appeals." [7] Reply 6. This Court need not opine on whether the agency would have accepted plaintiffs' argument(s). What is critically important is that this Court cannot say that such an attempt would have been clearly useless or the outcome certainly determined as the futility doctrine requires. Because plaintiffs have not satisfied their burden that seeking administrative remedies would have been futile, their failure to exhaust administrative remedies is not excused and their allegation with respect to the *de facto* revision is therefore dismissed for lack of subject matter jurisdiction.

Plaintiffs also allege in Claim One that the Forest Service evaded the Forest Plan amendment and revision processes by making "substantial changes" to the Flathead National Forest Plan without proper procedure, and by closing certain roads that "are required to ensure that adequate protection and care of the Forest can proceed." Compl. ¶ 50. Like plaintiffs allegation regarding the *de facto* revision, Plaintiffs were statutorily required to challenge these actions administratively before seeking relief in federal court. For the same reasons discussed above, the futility doctrine does not save plaintiffs from the consequences of their failure to exhaust. Accordingly, the Court will dismiss these alleged violations of the NFMA for failure to exhaust administrative remedies as well.

ii. Failure to State a Claim October 1, 2002

Where the movant bases the motion on a failure to state a claim upon which relief can be granted, the Court may dismiss based on dispositive issues of law. *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). Plaintiffs allege under Claim One that defendants failed to undertake the fifteen year revision of the Forest Plan as required by NFMA. [8] Compl. ¶ 50. Beginning with Pub. L. 107-63, § 327 (effective through October 1, 2002), however, Congress repeatedly passed legislation extending the fifteen year statutory deadline. In 2007, Congress extended the deadline through October 1, 2008. The statute reads:

> Prior to October 1, 2008, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f)(5)(A) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)(A))

> solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System. Nothing in this section exempts the Secretary from any other requirement of the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 et seq.) or any other law: Provided, That if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System, this section shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis.

Pub. L. 110-161, Title IV, § 410, Dec. 26, 2007, 121 Stat. 1844 ("2008 Consolidated Appropriations Act"). Accordingly, the Forest Service's failure to revise the plan is saved by the statutory safe harbor unless plaintiffs can show defendants are not acting expeditiously and in good faith. Plaintiffs have made no such showing.

As defendants make clear, the forest plan revision is well underway. Mot. 24. Indeed, at the hearing on plaintiffs' Motion for Preliminary Injunction, Judge Roberts found defendants had failed to make a sufficient showing that defendants were not acting with reasonable expedition. Tr. at 62 (Hearing, August 16, 2004). [9] The Court is aware that defendants changed their prediction for completion of the revision from the spring of 2006 until the fall of 2007, [10] but finds defendants' explanation reasonable. [11] Because plaintiffs have not shown defendants are not acting "expeditiously and in good faith," they have failed to

state a claim and the Court will dismiss this alleged violation of the NFMA accordingly.

B. Claim Two: Violation of Administrative Procedures Act ("APA")

Agency actions may be judicially reviewed under the APA and set aside if they are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5. U.S.C. § 706(2)(A). Judicial review of agency action may be reviewed only where: (a) the agency has taken final action; or (b) in limited circumstances, where the agency failed to act and such action was both statutorily mandated and non-discretionary. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61-64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). Plaintiffs allege defendants violated the APA by failing "to take action to revise the Forest Plan within the 15-year time set by statute" and because such failure "was based on such considerations as whether they might be sued, their own personal preferences as to the uses they preferred to be made to Forest lands, and political considerations rather than the considerations *mandated* by law and professional scientific standards." Compl. ¶¶ 55-56.

Though styled as a violation of the APA rather than the NFMA, Claim Two attacks the same alleged "failure" to revise the plan as above -- the failure to revise the plan within fifteen years -- and will be dismissed for the same reasons. Congress made clear that the Forest Service shall not be found in violation of the fifteen year statutory deadline absent a showing that the Forest Service is not acting expeditiously and in good faith. 2008 Consolidated Appropriations Act. As discussed above, plaintiffs have demonstrated neither.

Accordingly, the Court will dismiss Claim Two for failure to state a claim.

C. Claim Three: Violation of FLPMA, R.S. 2477

The Mining Law of 1866 provided, "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932. The Federal Land Policy Management Act (FLPMA) repealed R.S. 2477 on October 21, 1976, but expressly preserved any valid, existing rights of way. FLPMA § 701(a), 43 U.S.C. § 1701. Plaintiffs allege defendants "have closed roads, and threaten to close other roads which were created under R.S. 2477 and which Defendants lack the authority to close." Compl. ¶ 60. Defendants answer that plaintiffs "implicitly contend that title to the roads belongs to the public rather than the Forest Service." Mot. 27. And, because the Supreme Court held that the Quiet Title Act ("QTA") provides the exclusive means by which a party may challenge the United States' title to real property, *Block v. North Dakota*, 461 U.S. 273, 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983), defendants contend this claim is properly brought only under the QTA -- which plaintiffs failed to do -- and this Court must therefore dismiss for want of subject matter jurisdiction. Mot. 27. Defendants are correct.

Plaintiffs argue that R.S. 2477 was an offer of dedication of easements across "unreserved, unappropriated federal lands" that could be accepted in either of two ways: "(a) by a positive act of appropriate officials manifesting a clear intent to accept the grant; or (b) by public use for such a period of time and in such a manner as to prove that the grant has been accepted."

Compl. ¶ 35. The FLPMA repealed R.S. 2477 but expressly preserved any valid, then existing rights. The complained of closures are roads where a public right of way was created by public use pursuant to R.S. 2477 prior to 1976, and therefore remains intact due to the saving clause of the FLPMA. Therefore, plaintiffs argue, the Forest Service was and is without authority to close the roads. Faced with the exclusivity of the QTA, plaintiffs argue (a) their claim is properly viewed as a taking under the Fifth Amendment and (b) they are not bound by the QTA because they sued defendants for *ultra vires* actions. In addition, plaintiffs submit that the QTA specifically exempts claims such as theirs because the QTA "does not apply to or affect" cases "which may or could have" been brought pursuant to 28 U.S.C. § 1346, *inter alia*. 28 U.S.C. § 2409a. Section 1346 provides concurrent jurisdiction between U.S. District Courts and the Court of Federal Claims over "any other civil action or claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of any executive department." *Id.* Accordingly, plaintiffs argue, because their claim is founded both on the Constitution and regulation, the exception applies.

The relevant case law supports defendants' position. The Seventh Circuit considered a similar attempt to sidestep the QTA in *Shawnee Trail Conservancy v. United States Department of Agriculture*, 222 F.3d 383 (2000). The plaintiffs in *Shawnee* did not claim the easements or rights of way were perfected under R.S. 2477. *Id.* However, the Seventh Circuit's analysis remains applicable because those plaintiffs claimed both private and public easements that predated the creation of the Shawnee National Forest and they

claimed, as here, the Forest Service therefore lacked authority to close certain roads. *Id.* at 386. There, as here, plaintiffs attempted to structure their claim "as a constitutional challenge to the federal governments' regulatory authority and not to its title." *Id.* The district court found the argument unpersuasive and dismissed their claim for lack of subject matter jurisdiction, citing the Supreme Court's declaration in *Block* that the QTA provides the exclusive avenue to challenge the United States' title to real property. *Id.* Despite the fact that the plaintiffs in *Shawnee* did not seek to quiet title in themselves and were therefore not adverse claimants, the circuit court affirmed and noted, "[t]o allow claimants to avoid the QTA by characterizing their complaint as a challenge to the federal government's regulatory authority would be to allow parties to seek a legal determination of disputed title without being subject to the limitations placed on such challenges." *Id.* at 388. Similarly, in *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978), plaintiffs sought to establish their right to use a public road purportedly created by operation of R.S. 2477. The Tenth Circuit held that real property interest created by operation of R.S. 2477, "[i]f it exists, [] is vested in the public generally" and "[m]embers of the public as such do not have a 'title' in public roads. To hold otherwise would signify some degree of ownership as an easement." *Id.* at 160. Finally, as defendants note, a similar attempt to use a *ultra vires* claim to avoid the QTA was rejected by the Ninth Circuit. *Alaska v. Babbitt*, 75 F.3d 449, 452 (9th Cir. 1995) (finding that the Supreme Court's *Block* decision precluded such an attack).

The Supreme Court made abundantly clear in *Block* that the QTA provides the exclusive means to challenge the United States' title to real property, and despite their attempt to characterize it otherwise, plaintiffs here seek to challenge the United States' title to real property outside the QTA and its strictures. Accordingly, the Court will dismiss Claim Three for lack of subject matter jurisdiction.

D. Claim Four: Violation of The Small Business Regulatory Enforcement Fairness Act 5 U.S.C. § 801.

The SBREFA requires federal agencies to submit a report of proposed rules to each House of Congress and the GAO before they may become effective. A major rule may not become effective until 60 days after it is submitted to Congress or published in the Federal Register. Plaintiffs allege that the Forest Service failed to submit their management plans and related matters to Congress as mandated by 5 U.S.C. § 801(a)(1)(A), and therefore seek a declaration that they are *void ab initio*. Compl. ¶ 64-65. Defendants move the Court to dismiss this claim for lack of subject matter jurisdiction because 5 U.S.C. § 805 provides that "[n]o determination, finding, action or omission under this chapter shall be subject to judicial review." Defendants are correct and the Court will dismiss Claim Four accordingly.

There is limited case law interpreting Section 805, but what is available supports the plain reading of the statute. *See Texas Sav. & Comty. Bankers Ass'n v. Fed. Housing Fin. Bd.*, No. A 97 CA 421 SS, 1998 U.S. Dist. LEXIS 13470, 1998 WL 842181 (W.D. Tex. June 25, 1998) (rejecting plaintiffs' allegation that FHFB's

failure to submit new rules to Congress violated SBREFA and holding "the language [805] could not be plainer" and "the statute provides for no judicial review of any 'determination, finding, action, or omission *under this chapter*"), *aff'd*, 201 F.3d 551 (5th Cir. Jan. 20, 2000); *United States v. American Elect. Power Serv.*, 218 F. Supp. 2d 931 (S.D. Ohio 2002) (holding that "the language of § 805 is plain" and that an agency's failure to submit a rule to Congress is not judicially reviewable); *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145, 1173 (D. Minn. 2004) (holding that section 805 precluded judicial review of the U.S. Fish and Wildlife's decision that the designation of certain critical habitat was not a major rule), *vacated in part on other grounds*, 421 F.3d 618 (8th Cir. 2005).

Plaintiffs argue that if the Court were to interpret Section 805 to preclude judicial review, such a holding would impliedly repeal the grant of judicial authority under the APA to declare whether certain regulations are effective and in accordance with law. Opp'n. 40. And, because an implied repeal cannot be found absent a clear and manifest intent to repeal the other provision, *Calloway v. District of Columbia*, 342 U.S. App. D.C. 110, 216 F.3d 1, 10 (D.C. Cir. 2000), plaintiffs argue this Court must interpret Section 805 in a manner that does not require such an implied repeal. Opp'n. 40-41. Plaintiffs are unpersuasive. Section 805 unambiguously states that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." The 'chapter' to which this provision refers is Chapter 8. Chapter 8 is the SBREFA. The SBREFA was added to Title 5 by the Contract With America Advancement Act of 1996. Pub. L. No. 104-

121. As defendants appropriately state: "There is no logical means to reach a determination on Forest Service compliance with SBREFA without running afoul of the Congressional bar on judicial review." Mot. 32. This Court, therefore, is statutorily barred from reviewing defendants' alleged failure to submit their management plans and related matters to Congress and for that reason will dismiss Claim Four for lack of subject matter jurisdiction.

For all of the foregoing reasons, the Court will **GRANT** defendants' Fed. R. Civ. P. 12(c) Motion. An appropriate Order accompanies this memorandum opinion.

March 31, 2008

/s/ Thomas F. Hogan

Thomas F. Hogan

Chief Judge

Footnotes

1 Plaintiffs include: Montanans for Multiple Use; Northwest Montana Gold Prospectors Association; Montanans for Property Rights; Capital Trail Vehicle Riders Association; Flathead Snowmobile Association; North American Wolf Watch; Flathead Business and Industry Association; Leland's Honda and Suzuki, Inc.; Owens & Hurst Lumber Co; The Hon. Jerry O'Neil, Montana State Senate; The Hon. George Everett, Montana House of Representatives; Flathead County, MT; Sanders County, MT; and, Leland J. Moore.

2 The parties' dispute the total number of amendments, but plaintiffs' Complaint alleges defendants adopted 23. Compl. P 41.

3 When defendants filed their motion in 2004, they predicted the revision would be completed in the spring of 2006. To date, though, it appears the Forest Plan still has not been revised.

4 It is not clear whether the *de facto* revision occurred with the adoption of Amendment 21, or the OHV Amendment. Plaintiffs' Opposition states: "[i]t was not until all amendments through Amendment 21 and the Off Highway Vehicle ("OHV") amendments . . . had been adopted that the *de facto* revision could be said to be complete enough to trigger the statute of limitations. The same can be said for Movants' claims that plaintiffs failed to exhaust administrative remedies." Opp'n. 27.

5 The plaintiffs' argument reminds the Court of the parable of the frog and a boiling pot of water. Placed in hot water, the story goes, the frog immediately leaps from the pot in protest. But placed in cool water that is heated one degree at a time, he remains in the pot until -- sadly -- it is too late and the poor fellow is cooked. Here, the addition of each amendment ratcheted up the forest plan's offensiveness quotient one more click. Before one knows the violation occurred, the administrative appeal procedures have lapsed and their appeal is dead in the water.

6 The actions to be taken under the plan are first described in the published proposal.

7 Defendants note that a similar challenge was raised in an administrative appeal under the Forest Service appeal rules. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 898-99 (9th Cir. 2002). As defendants correctly state, "the case demonstrates that there is nothing within the Forest Service's appeal rules that would preclude consideration of the type of issues Plaintiffs raise in their Complaint." Reply 6-7. The existence of this case, alone, dismantles plaintiffs' futility argument.

8 16 U.S.C. § 1604(f)(5)(A) reads: "[The Forest Plan shall be revised] from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years."

9 Judge Roberts found: "[w]ith respect to expedition, the Forest Service has presented a plan for revising the plan that was adopted such that the draft revised plan is due by the spring of 2005 with the hope and target that the final plan revised [sic] will be coming in approximately a year after that. I don't find that that is a sufficient showing of the secretary's not acting with reasonable expedition."

10 At oral argument defendants submitted to the Court that the Agency altered the rules governing plan revisions and, as a result, defendants extended their prediction for completion.

11 "Moreover, defendants are currently undertaking the public participation processes required for plan revisions. Because these processes, *e.g.*, public comment, are subject to specific time periods, even if the Court were to find the Forest Service is not acting

in good faith or expeditiously the Court could not order the Forest Service to move any more quickly than they are currently. The only relief the Court could offer, therefore, would be an order setting] a timetable for completion by the fall of 2008, which is consistent with the current prediction.

Civil No. 03-1244 (TFH)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTANANS FOR MULTIPLE USE, et al.,
Plaintiff,

v.

BARBOULETOS, et al., Defendants, and SWAN VIEW COALITION, et al., Defendant-Intervenors.

March 31, 2008, Decided

ORDER

Pending before the Court is Defendant-Intervenors' Motion for Judgment on the Pleadings [Docket No. 32]. Given that the plaintiffs' Complaint was dismissed in accordance with the Memorandum Opinion and Order issued today, it hereby is

ORDERED that Defendant-Intervenors' Motion for Judgment on the Pleadings is DENIED AS MOOT.

SO ORDERED.

Civil No. 03-1244 (TFH)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTANANS FOR MULTIPLE USE, et al.,
Plaintiff,

v.

BARBOULETOS, et al., Defendants, and SWAN VIEW COALITION, et al., Defendant-Intervenors.

March 31, 2008, Decided

ORDER

Pending before the Court is Defendants' Motion for Judgment on the Pleadings [Docket No. 31]. For the reasons set forth in the accompanying Memorandum Opinion, it hereby is ORDERED that Defendants' Motion for Judgment on the Pleadings is GRANTED. Accordingly, the plaintiffs' Complaint shall be dismissed without prejudice.

SO ORDERED.

September 18, 2009
No. 08-5131
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MONTANANS FOR MULTIPLE USE, A NOT-FOR-PROFIT ORGANIZATION, ET AL., APPELLANTS
v.
CATHY BARBOULETOS, FLATHEAD NATIONAL FOREST SUPERVISOR, ET AL., APPELLEES

BEFORE: Ginsburg and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for panel rehearing and appellees' response thereto; and the unopposed motion of intervenors-defendants-appellees for leave to late file a response, and the lodged response, it is

ORDERED that the petition for panel rehearing be denied. It is FURTHER ORDERED that the motion for leave be dismissed as moot.

Per Curiam

RELEVANT STATUTORY SECTIONS

1. 5 USC § 551

For the purpose of this subchapter—
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;
or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641 (b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

2. 5 U.S.C § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall

not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

3. 5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

4. Small Business Regulatory Fairness Enforcement Act (SBREFA), P.L. 104-121, March 29, 1996, (As Amended by P.L. 110-28, May 25, 2007)

SEC. 202. FINDINGS.

Congress finds that--

(1) a vibrant and growing small business sector is critical to creating jobs in a dynamic economy;

(2) small businesses bear a disproportionate share of regulatory costs and burdens;

(3) fundamental changes that are needed in the

regulatory and enforcement culture of Federal agencies to make agencies more responsive to small business can be made without compromising the statutory missions of the agencies;

(4) three of the top recommendations of the 1995 White House Conference on Small Business involve reforms to the way government regulations are developed and enforced, and reductions in government paperwork requirements;

(5) the requirements of chapter 6 of title 5, United States Code, have too often been ignored by government agencies, resulting in greater regulatory burdens on small entities than necessitated by statute; and

(6) small entities should be given the opportunity to seek judicial review of agency actions required by chapter 6 of title 5, United States Code.

SEC. 203. PURPOSES.

The purposes of this title are--

(1) to implement certain recommendations of the 1995 White House Conference on Small Business regarding the development and enforcement of Federal regulations;

(2) to provide for judicial review of chapter 6 of title 5, United States Code;

(3) to encourage the effective participation of small businesses in the Federal regulatory process;

(4) to simplify the language of Federal regulations affecting small businesses;

(5) to develop more accessible sources of information on regulatory and reporting requirements for small businesses;

(6) to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution- oriented; and

(7) to make Federal regulators more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities.
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5. Codified Provisions of the Small Business Regulatory Enforcement Fairness Act

5 U.S.C. § Sec. 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing--

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and
(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress--

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of--

(A) the later of the date occurring 60 days after the date on which--

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date--

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to

Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is--

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring--

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days, before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though--

(i) such rule were published in the Federal Register (as a rule that shall take effect) on--

(I) in the case of the Senate, the 15th session day, or

(II) in the case of the House of Representatives, the

15th legislative day,

after the succeeding session of Congress first convenes; and
(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though--

(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

5 U.S.C. § 808. Effective date of certain rules

Notwithstanding section 801--

(1) any rule that establishes, modifies, opens, closes, or conducts a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or

(2) any rule which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Federal agency promulgating the rule determines.

5 U.S.C. § 805. Judicial review

No determination, finding, action, or omission under this chapter shall be subject to judicial review.

6. National Forest Management Act (Relevant Sections) (16 U.S.C. § 1604 (a) – (f)

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606 (c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with

this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528–531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability

for resource management.

(f) Required provisions
Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;
(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised

(A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and

(B) in accordance with the provisions of subsections (e)

and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

7. 28 U.S.C. § 2201, 2202 (Declaratory Judgment Act)

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

8. 28 U.S.C. § 2409a (a)

(a) The United States may be named as a party

defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

9. 43 U.S.C. § 1701(h)

(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

10. 43 U.S.C. § 1761(c)(2)(A)

(A) Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate.

11. 42 U.S.C. § 1769

(a) Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter.

12. Pub. L. 110-161, § 410

SEC. 410. Prior to October 1, 2008, the Secretary of Agriculture shall not be considered to be in violation of subparagraph 6(f)(5)(A) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(5)(A)) solely because more than 15 years have passed without revision of the plan for a unit of the National Forest System. Nothing in this section exempts the Secretary from any other requirement of the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 et seq.) or any other law: Provided, That if the Secretary is not acting expeditiously and in good faith, within the funding available, to revise a plan for a unit of the National Forest System, this section shall be void with respect to such plan and a court of proper jurisdiction may order completion of the plan on an accelerated basis.